

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 30186 (Sub No. 3) *

227756

**TONGUE RIVER RAILROAD COMPANY INC.—CONSTRUCTION AND
OPERATION—WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC.
TO PETITION TO REOPEN**

Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Tongue River Railroad
Company, Inc.

September 9, 2010

* The Petition to Reopen also embraces Finance Docket No. 30186, *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, and Finance Docket No. 30186 (Sub-No. 2), *Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana*.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 30186 (Sub No. 3)

**TONGUE RIVER RAILROAD COMPANY INC.—CONSTRUCTION AND
OPERATION—WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC.
TO PETITION TO REOPEN**

PREFACE AND SUMMARY OF ARGUMENT

Tongue River Railroad Company, Inc. (“TRRC”) hereby replies in opposition to the July 26, 2010 Petition to Reopen filed in these proceedings by Northern Plains Resource Council (“NPRC”) and Mr. Mark Fix (hereafter referred to as “NPRC Petition”).^{*} NPRC argues that reopening of the agency decisions and supplemental environmental review upon reopening are warranted by: (1) substantially changed circumstances resulting from the leasing of certain properties on which coal mines may be developed that would be served by the TRRC rail line, i.e., the Otter Creek coal tracts in Montana; (2) the emergence since the Board’s issuance of the October 2006 Final Supplemental EIS in *TRRC III* of “a substantial body of new scientific evidence on the accelerating effects of climate change” and the need to reduce carbon dioxide (“CO₂”)

^{*} The Petition to Reopen also embraces Finance Docket No. 30186, *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, and Finance Docket No. 30186 (ICC 1985) (“*TRRC I*”); and Finance Docket No. 30186 (Sub No. 2), *Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana* (STB 1996) (“*TRRC II*”). Finance Docket No. 30186 (Sub No. 3), *Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment* (STB 2007) is hereafter referred to as *TRRC III*.

emissions from the burning of coal and other fossil fuels and (3) “significant developments in the law requiring” reconsideration of the TRRC decisions in light of the implications of climate change.

TRRC will demonstrate in its accompanying Reply that the Petitioners have failed to meet their burden under the Board’s rules at 49 CFR 1115.4 or 1105.10(a)(5) to show substantially changed circumstances or new evidence that would warrant either the reopening of the Board’s decisions or further supplementation of the EISs prepared in the three *TRRC* proceedings beyond the extensive Supplemental EIS completed in 2006. The facts simply do not support the reopening that NPRC seeks because: (1) the cumulative impacts of rail operation and assumed mining at Otter Creek have already been assessed in the relevant EISs and thus the leasing of the Otter Creek tracts does not represent a substantially changed circumstance warranting further assessment and (2) the EISs have already determined that the TRRC line will not result in a significant increase in air emissions, including emissions of CO₂ resulting from the use of the coal that would be transported by the TRRC. Thus, new information on the effects of climate change is simply not material to the *TRRC* proceedings; the Board has already concluded that there will be no significant increase in CO₂ emissions and there is nothing for the Board to further study with respect to climate change.

With respect to the leasing of the Otter Creek tracts, TRRC will show that the EISs in *TRRC I* assumed the development of several coal mines in the Otter Creek area and analyzed, with respect to a variety of different impacts, the cumulative impacts of that coal mining and related TRRC rail activities. The mere fact that the leasing of this one area for potential coal development has now occurred does not offer any specific new

information that would warrant supplemental environmental analysis. In fact, the leases that were entered do not ensure that there will be mining at Otter Creek in the reasonably foreseeable future as there remain several legal, regulatory and related environmental review steps that must be taken before mining could occur at Otter Creek.

With respect to the climate change argument, neither new scientific evidence nor legal developments in the area of climate change merit reopening. The Board has previously determined that air emission changes, including CO₂ emissions, resulting from the operation of the TRRC line, including the burning of the coal that the railroad will transport, will be *de minimis*. The information concerning the effects of climate change resulting from CO₂ and other greenhouse gas ("GHG") emissions that Petitioners claim is new is simply not material to this proceeding and would not change the analysis or warrant further supplemental analysis. Accordingly, reopening is not warranted.

TRRC will address these points in greater detail in the body of this Reply.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 30186 (Sub No. 3)

**TONGUE RIVER RAILROAD COMPANY INC.—CONSTRUCTION AND
OPERATION—WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC.
TO PETITION TO REOPEN**

The Board has made clear that, “[t]o justify reopening a final Board decision a changed circumstance must be one that could materially affect the prior decision.” *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, Docket No. FD 34914 (STB served May 7, 2010) at 6; *see also Clipper Exxpress Co.—Petition for Declaratory Order*, Docket No. MC-C-10903, 1985 MCC Lexis 423 at *6 (ICC served May 13, 1985) (“A petition to reopen...will be granted only on a showing that the prior action will be affected materially because of new evidence or changed circumstances or that the prior action involves material error.”). Here, the burden is on the Petitioners to demonstrate that this standard is met. *Pittsburgh-Johnstown-Altoona Express, Inc.—Petition for Declaratory Order*, 8 I.C.C. 2d 815, 818 (ICC served April 22, 1992) (burden of persuasion is on the party seeking to reopen); *Simmons v. ICC*, 760 F.2d 126, 132 (7th Cir. 1985) (same). Further, “[t]he United States Supreme Court has consistently subscribed to the rule that administrative agencies are not to be required to reopen their final orders ‘except in the most extraordinary circumstances.’” *Boston Contract Carrier, Inc., Extension—Points in Rhode Island*, Docket No. MC-146440, 1986 MCC Lexis 409 at *3 (ICC

served April 29, 1986) (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974)).

Further, Petitioners seek reopening for the sole purpose of supplementation of the EISs previously conducted in these proceedings. However, an agency is not required to supplement an EIS every time new information becomes available: “to require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1980). Under Council on Environmental Quality (“CEQ”) regulations, agencies are required to supplement an original EIS if: “[t]here are *significant* new circumstances or information *relevant to environmental concerns and bearing on the proposed action or its impacts*.” 40 C.F.R. § 1502.9(c)(1)(i) & (ii). Thus, an agency must supplement an EIS only when the new information results in a “*seriously different* picture of the environmental landscape.” *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) (emphasis added).

TRRC will demonstrate below that the Petitioners have failed to meet their heavy burden to demonstrate that the criteria necessary to warrant either reopening or EIS supplementation are met.

I. Background

The NPRC Petition apparently seeks reopening of the final agency decisions: (a) issued by the Interstate Commerce Commission in 1986 in *TRRC I* authorizing construction of an 89 mile rail line between Miles City, MT and Ashland, MT; (b) issued by the STB in 1996 in *TRRC II* authorizing construction of a 41 mile line between Ashland, MT and Decker, MT and (c) issued by the STB in 2007 in *TRRC III* authorizing a new routing for the southernmost 17 miles of the line authorized in *TRRC II*.

The latter two decisions are currently the subject of consolidated judicial review proceedings pending in the U.S. Court of Appeals for the Ninth Circuit, in which the same two parties to the Petition to Reopen and others are seeking to overturn the Board's decisions for, among other reasons, not conducting a sufficient environmental analysis of the cumulative impacts of the TRRC line and the mining that may occur on the Otter Creek tracts. Petitioners NPRC and Fix have already filed their initial brief with the Ninth Circuit and briefing is scheduled to be completed by the end of the year. *Northern Plains Resource Council, et al v. STB*, Case Nos. 97-70037, 97-70099, 97-70217, 07-74348 (9th Cir.). Judicial review of the *TRRC I* decision was unsuccessfully sought by NPRC. *Northern Plains Resource Council v. ICC*, 817 F.2d 758 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987).

The TRRC line, which is intended to transport coal from Montana and Wyoming mines to utilities in the Upper Midwest and elsewhere, has not yet been constructed. However, TRRC is continuing to work with numerous interested parties toward the end of construction of the lines. The Petitioners have long opposed construction of the line.

II. The Leasing Of The Otter Creek Tracts Does Not Warrant Reopening The Tongue River Proceedings

NPRC's Petition argues that the Otter Creek coal leases constitute a substantial change in circumstances that requires the preparation of a supplemental environmental impact statement ("EIS") and the reopening of the Board's decisions in the previous Tongue River proceedings. NPRC Petition at 1-10. According to NPRC, the Board previously found that the environmental impacts of potential Otter Creek coal mines were too speculative to warrant consideration in the *TRRC III* Supplemental EISs and prior EISs¹ but the recent leasing by the State of Montana of

¹ "TRRC III Supplemental EISs" refers to the *Draft Supplemental Environmental Impact Statement, Tongue River Railroad Company, Inc.—Construction and Operation—Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Oct. 15, 2004) [hereinafter

the Otter Creek tracts warrants reopening to consider these impacts, which it suggests are no longer speculative.

NPRC's arguments concerning Otter Creek rest on two related propositions. The first proposition is that the Board and the ICC have not previously considered the potential environmental impacts of mining coal in the Otter Creek area, either as a connected action or cumulative impact with the construction and operation of the TRRC rail line. The second proposition is that the leasing of the Otter Creek tracts marks a substantial change in circumstances warranting reopening and supplementing the environmental review to consider the impacts of mining in the Otter Creek region.

Neither proposition has merit. The Board and its predecessor did in fact analyze the cumulative impacts of the TRRC line and the mining that might occur in the Otter Creek area. The Board did so in the EISs prepared in *TRRC I* and *TRRC II* on the basis of an assumption that the Otter Creek coal lands would be leased and mines developed on the land. It then updated its

TRRC III DSEIS] and the *Final Supplemental Environmental Impact Statement, Tongue River Railroad Company, Inc.—Construction and Operation—Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Oct. 13, 2006) [hereinafter *TRRC III FSEIS*]. The EISs prepared in *TRRC I* are the *Draft Environmental Impact Statement, Tongue River Railroad Company—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (STB served July 15, 1983) [hereinafter *TRRC I DEIS*], the *Supplement to Draft Environmental Impact Statement, Tongue River Railroad Company—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (STB served Jan. 19, 1984), and the *Final Environmental Impact Statement, Tongue River Railroad Company—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (STB served Aug. 23, 1985) [hereinafter *TRRC I FEIS*]. The EISs prepared in *TRRC II* are the *Draft Environmental Impact Statement, Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB served July 17, 1992) [hereinafter *TRRC II DEIS*], the *Supplement to Draft Environmental Impact Statement, Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB served March 17, 1994) and the *Final Environmental Impact Statement, Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB served Apr. 11, 1996) [hereinafter *TRRC II FEIS*].

analyses in *TRRC III*, notwithstanding the still-speculative nature of the mining at Otter Creek. Since the Board assumed that Otter Creek coal lands would be leased and that coal would be extracted, and analyzed the effects of these actions, the recent Otter Creek Leases do not constitute a changed circumstance at all, much less one warranting reopening.

In fact, the leasing of the Otter Creek tracts brings to light no new information about the potential impacts of mining than was available prior to the leasing. It is therefore no surprise that NPRC's Petition points to no specific facts now available that were not previously available warranting supplemental environmental analysis, a deficiency that underscores the fundamental flaw with NPRC's argument for reopening and supplementation. The Leases themselves hardly offer a basis for further environmental review; they are legal documents that disclose no specific facts about the possible mine operations that would be relevant to an environmental analysis.

Indeed, notwithstanding the Leases, it is by no means resolved that coal mines will be established at Otter Creek or, if so, what the environmental impacts of those mines might be. The lease attached to the NPRC Petition allows the lessee (Ark Land Company) up to ten years to obtain a mining permit and does not set any parameters as to the mining itself other than requiring the lessee to avoid unnecessary damage to natural resources and interference with water rights.² Further, pending court challenges to the Otter Creek Leases, as well as regulatory hurdles, must be overcome before any mine development could begin. It thus would be premature to expend scarce administrative resources supplementing the TRRC environmental analysis (even if there were some new facts to assess at this time) given that the Leases could be voided

² See Otter Creek Coal Mine Lease attached at Appendix A to the NPRC Petition ("the Lease"). TRRC understands that there were in fact numerous leases entered with the same lessee for different portions of the Otter Creek tracts. Thus, this Reply will refer to "Leases", each of which is assumed to be virtually identical (except for the property description) to the lease attached to the Petition.

by a court and/or the mine developer could be denied a mining permit even if the Leases withstand challenge.

a. Because the Board Analyzed the Potential Impacts of Leasing the Otter Creek Tracts and Operating Otter Creek Mines in *TRRC I* and *TRRC II* and Reaffirmed this Analysis in *TRRC III*, the Leasing of the Tracts Does Not Constitute Changed Circumstances Warranting Supplemental Analysis

NPRC's Petition contains an extensive discussion of how, in NPRC's view, the TRRC line and the development of mines at Otter Creek are, for NEPA purposes, either connected actions or reasonably foreseeable and cumulative actions that must be assessed jointly in the same EIS. NPRC Petition at 4-10. The implication of the discussion is that the Board did not consider the environmental impacts of the Otter Creek mines because, at the time, there were no specific proposals for leasing the Otter Creek tracts.³ Based on that unstated assumption, Petitioners argue that the leasing is a materially changed circumstance that warrants reopening.

The facts, however, are otherwise. The Board and its predecessor did conduct a detailed analysis of the environmental impacts of projected mine development in the Otter Creek area as a related action to the railroad and thus met its NEPA obligations. The Petitioners' discussion of why such mining and related rail activities require NEPA analysis of their collective or cumulative impacts is thus largely irrelevant because that analysis has already been undertaken. In this setting, the mere leasing of the Otter Creek tracts does not represent anything close to a material change in circumstances warranting further environmental analysis.

³ See NPRC Petition at 5 ("Together, the proposed railroad and coal mine would fundamentally change the character of the environment and the quality of life enjoyed by... residents of this area. The Board should reopen the proceeding to address the impacts of the Otter Creek mine in a supplemental EIS..."); NPRC Petition at 1 ("[T]here have been substantial changes in circumstances, including the recent leasing of the Otter Creek coal tracts, which the Board previously ruled were too speculative to warrant consideration...").

In *TRRC I*, the Board recognized the potential development of a projected total of five mines in the Ashland/Birney/Otter Creek area as “related actions” to the construction of the railroad and analyzed the cumulative environmental impact of this assumed mine development in both the Draft EIS and Final EIS. *See, e.g.*, pages 40, 45 and 62 of the *TRRC I FEIS* (noting that TRRC would serve an assumed five mines in the Ashland/Birney/Otter Creek areas).⁴ Accordingly, Chapter 4 of the Draft EIS and the Final EIS in *TRRC I* sets forth an analysis, for each studied category, of the impacts of TRRC rail construction, rail operation, “downline” operations, mine development and operation related to the railroad, and the overall impacts of rail and mining activities at these assumed mines in the Otter Creek and other TRRC-served areas. The analysis, which consumes 84 pages in the Draft EIS and another 109 pages in the Final EIS, covers these rail *and* related mining impacts with respect to land use, transportation, energy, air quality, noise, safety, soils and geology, hydrology, water quality, aquatic resources, agriculture, terrestrial ecology, cultural resources, as well as aesthetic, social and economic impacts.

For example, with respect to soils and geology, the Final EIS describes the anticipated impacts of the railroad on erosion and soil loss, as well as the impacts of the assumed development of five mines on land disturbance and vegetation.⁵ The Final EIS also observed that soils unaffected by mining may provide adequate soil for reclamation but noted that more information regarding reclamation would be available when reclamation plans and site-specific

⁴ *See also TRRC II DEIS*, which notes at page 3-16 that the *TRRC I EIS* assumed that TRRC would serve 5 mines in the Otter Creek and other areas.

⁵ *TRRC I FEIS* at 103-107.

environmental impact statements were prepared for each mine as required by Montana law during the mine permitting process.⁶

Similarly, with respect to land use, the Final EIS describes the impacts of rail construction and operation on land use along the rail right of way, and then proceeds to assess the impacts on land use of mine development and on community development due to the increased number of persons that would be attracted to the area by mining.⁷ The overall impacts of all of these activities are also summarized and assessed.⁸

Included in the environmental analyses is the potential effect of mining on alluvial waters.⁹ For example, the EIS concludes that the level of total dissolved solids from mining activities would increase in Otter Creek, but not to a point where the water could not continue to be used for current purposes. NPRC claims that impacts of mining on alluvial valley floors ("AVFs") has not been analyzed by the Board, but the Final EIS indicates that the impacts of the railroad and mining on water resources have in fact been studied.¹⁰

⁶ *TRRC I FEIS* at 106-07.

⁷ *TRRC I FEIS* at 49-63.

⁸ *TRRC I FEIS* at 62-63.

⁹ *TRRC I FEIS* at 112-114.

¹⁰ NPRC points to the lack of analysis with respect to "alluvial valley floors" ("AVFs") as defined by Montana statute. NPRC Petition at 9-10. Although the EISs did not determine whether there are any AVFs as defined by the statute in the Otter Creek area, the EIS concluded that surface water and ground water flow would be restored to pre-mining conditions; alluvial ground water beyond the specific mining areas would not be impacted; and the alluvial ground water that is affected would remain suitable for its current uses. See *TRRC I DEIS* at 4-55 through 4-56 and *TRRC I FEIS* at 112-13. Further, as NPRC notes, the State of Montana is responsible for mapping AVFs and for regulating coal mining to protect them. NPRC Petition at 10. The state may not approve a mining permit for mining that would disrupt farming on AVFs or materially damage the water systems that supply AVFs. MONT. CODE ANN. §§ 82-4-227(3)(b). Therefore, no mine will be permitted that would significantly harm AVFs or farming operations dependent upon them.

In *TRRC II*, the Board adopted the findings of *TRRC I* with respect to the environmental impacts of mining in the Otter Creek area.¹¹ And in *TRRC III*, the Board reviewed the findings of *TRRC I* and *TRRC II* with respect to the potential cumulative impacts related to rail and mine development and determined that the prior impacts analyses remained valid.¹² Further, the *TRRC III FSEIS* supplemented the prior air quality analyses set forth in the *TRRC I* and *TRRC II* EISs (which found minimal emissions impacts from rail construction and from rail and mining operations) by also addressing the potential for increased air emissions, including CO₂ emissions, resulting from the use of the coal transported by the TRRC rail line by coal-burning utilities.¹³ It concluded that any increases in coal consumption resulting from TRRC operations will be minimal, resulting in insignificant national and regional emissions impacts.¹⁴

Thus, the Board has provided a detailed analysis of the potential environmental impacts associated with assumed mine development in the Otter Creek area and, in its most recent environmental review completed in 2006, affirmed the continued validity of that analysis and supplemented it as appropriate. As a result, the actual leasing of the Otter Creek tracts is not a material new circumstance; it was predicted and assumed in the prior EISs that at some future

¹¹ See, e.g., *TRRC II DEIS* at 3-16 ("As is evident from the 1985 TRRC EIS, many of the more significant impacts from the proposed railroad actually derive from the new mines. That general conclusion applies to the analysis of the proposed Extension or the Four Mile Creek Alternative.... Only significant differences in related actions are reported in the present analysis. This principally concerns socioeconomic impacts to residents of the four affected counties.")

¹² See, e.g., *TRRC III FSEIS* at 2-33 ("SEA concludes that the previous assessment of potential impacts related to mine development in the Ashland/Birney/Otter Creek area, as identified in the EISs for these proceedings, remain valid. On this basis, SEA concludes that the construction and operation of Tongue River III would not result in any new or significant cumulative environmental effects related to mine development beyond what was found in Tongue River I and Tongue River II.").

¹³ *TRRC III FSEIS* at 2-34 through 2-59.

¹⁴ *Id.*

point mines would be developed.¹⁵ Moreover, apart from the fact that Leases have been entered, NPRC points to no new facts that are now known about mining at Otter Creek that were not considered in the prior EISs or that would suggest that the prior analysis is incomplete or otherwise inadequate.

NPRC relies on the Board's statement in *TRRC III* that "there was no need to modify the analysis of increased coal production in the Ashland/Birney/Otter Creek area beyond what was discussed in the Tongue River I and in Tongue River II proceedings because there are currently no proposals under review for leasing the Otter Creek tracts or constructing the coal-fired generator and power line that have been discussed."¹⁶ However, the quoted statement cannot fairly be read to suggest that, if there were leasing alone, further environmental analysis would be required. Rather, the Board's statement cites to the *TRRC III* Draft and Final Supplemental EISs. In the latter document, the Board explains as follows:

[T]he environmental effects of potential coal mining in the Ashland/Birney/Otter Creek area was analyzed as a related action in Section 4.0 of the Draft EIS completed in Tongue River I... According to this analysis, potential mine development could have adverse effects on land use, hydrology and water quality, biological resources, cultural resources and aesthetic resources... In Tongue River II, SEA updated Tongue River I coal tonnage forecasts... and reevaluated the environmental effects associated with potential mine development...[In Tongue

¹⁵ See, e.g., *Marsh* 490 U.S. at 374 (supplemental EIS required only if new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 60, 63 (4th Cir. 1990) (designation of an area as an historic district was not a changed circumstance that presented "a seriously different picture of the environmental impact" and therefore did not warrant a supplemental EIS because the FEIS acknowledged that some structures were eligible for inclusion in the National Register of Historic Places and considered the impacts of the project on the history of the area); *Friends of Canyon Lake v. Brownlee*, 2004 U.S. Dist. LEXIS 21838, at *46-48 (W.D. Tex. 2004) (holding that a decision to allow a state agency to withdraw additional water from a lake was not a changed circumstance requiring a supplemental EIS because the FEIS had considered the possibility of additional withdrawals).

¹⁶ *TRRC III* at 30.

River III], SEA concluded that there are no material changes that warrant an assumption of increased coal production generally or increased coal production in the Ashland/Birney/Otter Creek area beyond what was analyzed in Tongue River II... In short, there are no prospective mine development projects beyond what were analyzed in Tongue River I and Tongue River II that meet SEA's definition of reasonably foreseeable. Because environmental conditions in the corridor have not meaningfully changed since completion of the EISs in Tongue River I and Tongue River II, SEA concludes that the previous assessment of potential impacts related to mine development in the Ashland/Birney/Otter Creek area...remain valid. On this basis, SEA concludes that the construction and operation of Tongue River III would not result in any new significant cumulative environmental effects related to mine development beyond what was found in Tongue River I and Tongue River II.¹⁷

The above quoted language makes clear not only that the environmental impacts of mine development in the Otter Creek area were adequately analyzed in *TRRC I* and *TRRC II*, but that the Board deemed further analysis unwarranted absent developments indicating "new significant cumulative environmental effects related to mine development beyond what was found in Tongue River I and Tongue River II." As shown above, the leasing of the Otter Creek tracts, in and of itself, does not constitute a development indicating new significant cumulative environmental effects beyond what was analyzed in earlier EISs. The Leases are not new information that present "a seriously different picture of the likely environmental consequences of the proposed action" and thus no reopening or supplementation is warranted. *See State of Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984).¹⁸

¹⁷ *TRRC III FSEIS* at 2-32 (emphasis added)

¹⁸ By contrast, *Arizona Elec. Power Coop, Inc. v. BNSF*, STB Finance Docket Nos. 41185, 42077 (STB served May 12, 2003), cited by Petitioners to support reopening, was a rate case in which hard new evidence became available that the Board found justified reopening. In that case, the Board assumed that the mine operator would successfully conclude negotiations to acquire new coal reserves to replace dwindling coal reserves on adjacent lands. *Id.* at 2-3. However, the Board recognized that this assumption might prove inaccurate and, if it did, the proceedings should be reopened. *Id.* When it became clear that new coal reserves could not be obtained, the rail carrier filed a petition to reopen based on changed circumstances. The shipper did not challenge the fact that circumstances had changed. The Board stated that petitions to

b. The Otter Creek Leases Offer No Reason to Engage in Supplemental Environmental Review or to Reopen the Board's Decisions

NPRC rests its Petition on the leasing of the Otter Creek tracts, but as noted the Leases do not provide the Board any information that would allow it to conduct a more thorough environmental analysis of the potential impacts of mining. Nor is it even clear at this point that mines on the Otter Creek tracts will be established. If the process does move forward, the environmental impacts of the mine and the TRRC line would be analyzed during the permitting process, when substantially more detail regarding the mining operations would be available.

The Leases do not contain any details regarding the nature or extent of the mining operations that would permit the Board to provide a more thorough or accurate analysis. To the contrary, the Leases suggest that details regarding the mining operations may not be known for many years. According to the Leases, the lessee has up to ten years to obtain a mining permit. *See* section 2 of the Lease. This ten year period can be extended by the state if the lessee has been directly or indirectly prevented from exploring, developing, or operating the Leases or is threatened with substantial economic loss due to litigation regarding the Leases. *See* section 3 of the Lease. Further, the lessee can cancel the Leases by providing written notice at least 30 days before the anniversary date of the Leases. *See* section 14 of the Lease.

Not only do the Leases lack details regarding future mining operations, but they are the object of pending legal challenges. NPRC and the Sierra Club have each initiated lawsuits in Montana state court challenging the decision of the Montana Board of Land Commissioners to

reopen must be approached "cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality" but that reopening was appropriate because the rail carrier provided "undisputed evidence" that "a specifically identified and contested assumption in [the Board's] prior decisions" was incorrect. *Id.* at 3-4. In contrast, from the beginning of the TRRC proceedings, the Board has assumed that the Otter Creek coal tracts would be developed. The fact that leases have now been entered confirms rather than refutes an assumption from the Board's prior proceedings.

lease the Otter Creek tracts.¹⁹ In its complaint, NPRC claims that the state statute exempting a lease from environmental review under the Montana Environmental Policy Act (“MEPA”) if the lease is subject to further permitting violates the right to a clean environment protected by the Montana Constitution and that the Board of Land Commissioners’ decision to grant the Leases without conducting an environmental review was therefore void as a violation of the Montana Constitution and MEPA. The Sierra Club, in its complaint, makes essentially the same argument but also claims that the decision to grant the Leases without environmental review was a breach of the state’s statutory and common law public trust obligations. These suits, which were recently consolidated, are in the early stages of litigation and it thus could be many months if not years before the issues are decided.²⁰ If the plaintiffs prevail, the Leases would be overturned pending further environmental review.

Assuming that the Leases are upheld by the courts, the lessee must still obtain a mine permit from the Montana Department of Environmental Quality before it can begin to mine coal from the Otter Creek tracts.²¹ NPRC will have a full opportunity to participate in the permitting process and the associated state environmental review of the proposed mining under MEPA.

III. The Climate Change Information Petitioners Cite Does Not Necessitate Reopening of the Record or Supplementation of the EIS

NPRC argues that the TRRC environmental review must be further supplemented to consider “new and material” evidence on climate change. NPRC Petition at 10-20. However, while there may be “new” regulatory and scientific information available regarding global

¹⁹ Complaint, *Montana Envtl. Info. Ctr. v. Mont. Bd. of Land*, Case No. DV-38-2010-2481 (Mont. Dist. Ct. May 13, 2010); Complaint, *N. Plain Resource Council, Inc. v. Mont. Bd. of Land Comm’rs*, Case No. DV-38-2010-2480 (Mont. Dist. Ct. May 12, 2010).

²⁰ Copies of the complaints are attached at Exhibit 1 to this Reply.

²¹ See MONT. CODE ANN. §§ 82-4-121, 82-4-221.

climate change generally, NPRC has failed to demonstrate, as it must, that such information is “material” in relation to the TRRC project.

Petitioners list several developments related to climate change that have occurred since publication of the *TRRC III FSEIS* in 2006. NPRC Petition at 11-12. However, none of these developments are specific to the TRRC project, or would even have any impact on the project or the Board’s findings in the *TRRC III FSEIS*, including the finding (noted above and discussed further below) that the coal transported by the TRRC line will not significantly change the current level of air emissions associated with the use of coal.

For example, Petitioners point to the US Environmental Protection Agency’s recently-issued “tailoring rule”, which brings GHG emissions from stationary sources under the permitting programs of the Clean Air Act (CAA).²² This regulatory development has no relevance to the TRRC, which is not a stationary source subject to CAA permitting.

The other developments Petitioners list are similarly general developments in the law and science of climate change that have no impact on the TRRC project or the Board’s consideration of its environmental impacts. For example, NPRC cites to the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) discussing climate change and holding that CO₂ and other GHGs are pollutants under the Clean Air Act, and to EPA’s subsequent *Endangerment and Cause or Contribute Findings under Section 202 of the Clean Air Act* determination that GHGs endanger public health. 74 Fed. Reg. 66495 (Dec.15, 2009). These and like decisions cited by

²² Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pt. 51, 52, 70, and 71).

Petitioners are not material to the TRRC project, which the Board determined will have no significant air quality/emissions impacts.²³

Petitioners also cite to CEQ's "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions", dated February 18, 2010 ("Draft Guidance"). However, the Draft Guidance has not been finalized by CEQ and is not yet effective. *See* Draft Guidance at 12 ("After consideration of public comment, CEQ intends to expeditiously issue this guidance in final form. In the meantime, CEQ does not intend this guidance to become effective until its issuance in final form."). CEQ is apparently still in the process of considering the public comments received on the draft, so it is not yet clear what form the final guidance will take.

Even if the Draft Guidance were in effect, however, it would not require the Board to reopen this matter or further supplement the Supplemental EIS. First, the Draft Guidance is prospective – providing guidance for future NEPA reviews. There is nothing in the document to suggest such guidance would require agencies to reopen completed EISs, and clearly that is not CEQ's intent, since this would require supplementation of hundreds of EISs. Second, the Draft Guidance is aimed at actions that represent "a significant source of GHGs." Draft Guidance at 2.²⁴ The Draft Guidance provides that "if a proposed action would be reasonably anticipated to cause direct emissions of 25,000 metric tons or more of CO₂-equivalent GHG emissions on an annual basis, agencies should consider this an indicator that a quantitative and qualitative

²³ *See TRRC III FSEIS* at 2-34 through 2-59. For the same reason, the other materials on climate change cited at pages 11-13 of the NPRC Petition are not material to these proceedings.

²⁴ This is also evidenced by the examples of agency actions listed in the Draft Guidance as those that may warrant a discussion of the GHG impacts: "approval of a large solid waste landfill; approval of energy facilities such as a coal-fired power plant; or authorization of a methane venting coal mine." All of these examples are projects that would have significant direct GHG emissions, unlike the TRRC project. As noted in the Draft Guidance, "In many cases, the GHG emissions of the proposed action may be so small as to be a negligible consideration." *Id.* at 3.

assessment may be meaningful to decision makers and the public.” *Id.* at 1. Petitioners do not assert that the TRRC project will involve direct GHG emissions anywhere near this threshold.

In fact, the Board found the TRRC project not to be a significant source of air emissions generally, and thereby implicitly found that the project would not be a significant source of GHGs.²⁵ Moreover, as discussed, the Board also found that the project was unlikely to increase coal consumption and therefore would not be a significant source of indirect air emissions. As CEQ noted in the Draft Guidance, “[GHG] emissions from many proposed Federal actions would not typically be expected to produce an environmental effect that would trigger or otherwise require a detailed discussion in an EIS.” *Id.* at 3. Thus, even if the Draft Guidance were in effect, it would not require a change in the Board’s analysis or the *TRRC III FSEIS* because the TRRC project is not a significant source of GHG emissions.

Petitioners also cite *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 536, 550 (8th Cir. 2003) to support their argument that climate change impacts must be considered. However, the Board carefully reviewed the Dakota, Minnesota & Eastern Railroad (DM&E) decision at issue in *Mid States* and in the *TRRC III FSEIS* prepared a full analysis comparing the likely impacts on coal consumption and associated emissions in the TRRC case to these impacts in *DM&E*.²⁶ The Board found that the TRRC project is less likely to increase coal consumption and related air emissions than the DM&E project because of the smaller amount of coal TRRC would carry, the nature of the TRRC project, and the kind of coal TRRC would transport.²⁷ The

²⁵ See, e.g., *TRRC II FEIS* at 4-93 through 4-97 (estimating emissions and noting that air emissions would fall well below applicable air quality standards); *TRRC III FSEIS* at 2-34 through 2-59.

²⁶ See *TRRC III FSEIS* at 2-34 through 2-59.

²⁷ See *id.* at 2-36.

Board summarized the nature of the impacts associated with each pollutant, including CO₂, emitted in the coal burning process in accordance with the applicable CEQ regulation governing NEPA analyses in the absence of complete information, 40 C.F.R. § 1502.22(b).²⁸ In sum, the Board fully addressed the potential for increased emissions, including emissions of CO₂. It concluded that increases in coal consumption will be minimal, resulting in insignificant national and regional emissions impacts. Therefore, unlike *Mid States*, it is not reasonably foreseeable that the TRRC will lead to an increase in the consumption of coal, and thereby increase GHG emissions such as CO₂. There is thus no obligation on the Board to undertake a further analysis of the impact of this project on air emissions, including GHGs. *See Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545 (8th Cir. 2006) (rejecting argument that Supplemental EIS' consideration of emissions from end-use of coal was insufficient where project would result in only a small increase in coal consumption).

Petitioners also cite *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008) for the proposition that climate change impacts must be considered under NEPA. However, that case involved promulgation of national vehicle fuel economy standards, an action that the agency did not dispute would have an effect on global warming. Here, the agency action involves an individual rail project, rather than a national program, and the Board has found that the project will not significantly increase air emissions.²⁹ Thus, *Center for Biological Diversity* is inapt.

²⁸ *Id.* at 2-43 through 2-48.

²⁹ *See, e.g., TRRC II FEIS* at 4-93 through 4-96 (estimating emissions and noting that air emissions would fall well below applicable air quality standards); *TRRC III FSEIS* at 2-34 through 2-59 (concluding that the coal transported by TRRC would not add significantly to existing emission levels).

In point of fact, Petitioners can cite no cases to support their argument that an EIS must be supplemented to consider climate change impacts even where the project is not expected to have significant GHG emissions. As CEQ has recognized in its Draft Guidance regarding climate change, “[GHG] emissions from many proposed Federal actions would not typically be expected to produce an environmental effect that would trigger or otherwise require a detailed discussion in an EIS.” Draft Guidance at 3.

Petitioners also cite President Obama’s Executive Order 13514, *Federal Leadership in Environmental, Energy, and Economic Performance* (signed October 5, 2009) (EO). NPRC Petition at 19. However, the EO relates to improvements in federal agencies’ internal operations (such as increasing efficiency in federal buildings or of federal vehicle fleets), and has nothing to do with NEPA or the federal review of private projects such as TRRC.³⁰ The EO is completely irrelevant to the Board’s TRRC proceeding.

Petitioners list several mitigation measures for GHGs that they believe the Board should consider for TRRC rail operations. NPRC Petition at 19-20. However, because the Board found that the TRRC project will not lead to significant adverse emissions, and therefore effectively found that the project is not a significant contributor of GHGs, the Board was not required to consider GHG mitigation measures. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 737 (D.C. Cir. 2000) (“Given that FERC has identified only small increases in emissions resulting from open access transmission--indeed, under some circumstances, the Commission predicted small decreases--we think it was entirely reasonable for FERC to decline to adopt mitigation measures to address a problem that it believed might not even develop.”). There is no new information that suggests a material change to this conclusion. As shown,

³⁰ For example, the EO is aimed at “reducing energy intensity in agency buildings”; and “implementing renewable energy generation projects on agency property.” EO at 2.

neither the Draft CEQ Guidance nor the Executive Order, both of which are relied on by Petitioners to support the proposed mitigation, apply to the TRRC project and therefore neither require the Board to impose mitigation with respect to matters that warrant no special mitigation. Since the new evidence claimed by Petitioners is not material to the TRRC proceeding, there is also no basis on which the Board should accept Petitioners' invitation to reconsider the "no action" alternative.

CONCLUSION

As shown above, the NPRC Petition should be denied because NPRC has not met its burden to show that reopening is warranted. In addition, Petitioners' claim that reopening would not result in any prejudice is plainly wrong. The TRRC is not in limbo, as Petitioners claim, but continues to move forward actively to discuss the rail line with the relevant players and develop plans for its construction. TRRC thus would be severely prejudiced by further delay in these proceedings. For this additional reason, the NPRC Petition should be promptly denied.

Respectfully submitted,



Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Tongue River Railroad
Company, Inc

September 9, 2010

Exhibit 1

1 Jack R. Tuholske
2 TUHOLSKE LAW OFFICE, P.C.
3 PO Box 7458
4 234 East Pine Street
5 Missoula, Montana 59807
6 Telephone: (406) 721-6986
7 tuholske@centric.net

8 Patrick Parenteau, Esq
9 Vermont Law School
10 South Royalton, VT 05068
11 802 831-1305
12 pparenteau@vermontlaw.edu

13 MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, POWDER RIVER COUNTY

14 Northern Plain Resource Council Inc., National
15 Wildlife Federation,

16 Plaintiffs,

17 v.

18 Montana Board of Land Commissioners, State of
19 Montana, Ark Land Company Inc., Arch Coal
20 Inc.

21 Defendants.

Cause No.

COMPLAINT

22 Plaintiffs state their claim for relief as follows:

23 INTRODUCTION

24 This matter arises from the decision of the Montana Board of Land Commissioners' (Board)
25 to lease approximately 9000 acres of state lands and mineral rights in southeastern Montana. Both
26
27

28 Complaint 1

1 practically and legally, this lease constitutes an irretrievable and irreversible commitment of public
2 resources that forecloses alternative uses of these lands. Known as "Otter Creek," these lands
3 contain substantial coal reserves that, in combination with the proposed development of interspersed
4 tracts, will create the largest new coal mine in North America. Otter Creek also lies in the heart of
5 the ranching and farming communities in the Tongue River Valley, contains important wildlife
6 resources, and borders the Northern Cheyenne Reservation. Plaintiff Northern Plains Resource
7 Council (Northern Plains), is a non-profit devoted to promoting family farming and ranching and
8 environmental stewardship. Plaintiff National Wildlife Federation is the nation's largest conservation
9 organization, which over 5,000 Montana members. Plaintiffs do not contest the Board's authority to
10 lease Otter Creek. Rather, they contest the Board's decision to enter into a binding ease without
11 conducting *any* adequate environmental review of the impacts of its leasing decision, or considering
12 alternatives to the irrevocable grant contained in the lease.
13
14

15 The Board's decision to forego environmental review is based upon M.C.A. § 77-1-121,
16 which exempts "any lease" from MEPA when the lease is subject to further permitting under other
17 environmental statutes. However none of those statutes allow the state to forego mining altogether
18 or change the amount of land under lease. The Board has foreclosed the option of retaining these
19 lands in public ownership and committed them to mineral development without first considering
20 and disclosing to the public the substantial environmental consequences of this action, including
21 the potentially devastating climate change impacts from adding billions of tons of carbon dioxide
22 to the atmosphere from the combustion of this coal. Otter Creek may become North America's
23 largest coal mine. Montana's Constitution does not sanction blind leadership by officials imbued
24 with a constitutional duty to protect the environment nor does it grant the Legislature authority to
25
26
27

1 override fundamental constitutional rights. Because the constitutional environmental rights
2 contained in Article II, section 3 and Article IX, section 1 are fundamental rights, laws that infringe
3 upon those rights are subject to strict scrutiny. *Montana Environmental Information Center v.*
4 *Department of Environmental Quality*, 988 P.2d 1236, 1246 (Mont. 1999). The Board cannot
5 advance a compelling state interest for the statute as applied herein, nor can it show that the
6 exemption from all pre-leasing MEPA review is narrowly tailored to achieve such an interest. Indeed
7 the legislature has declared that MEPA is designed to implement our constitutional environmental
8 rights, M.C.A. § 75-1-102, rights which are both "preventative and anticipatory," *MEIC, supra.*, and
9 which impose pro-active obligations on government to protect the environment. *Cape France*
10 *Enterprises v. Estate of Lola Feed*, 2001 MT 139; 305 Mont. 513; 29 P.3d 1011. The statute's
11 blanket prohibition on any pre-leasing environmental review unlawfully prevents the Board from
12 fulfilling its constitutional duty to "maintain and improve a clean and healthful environment" for
13 current and future generations of Montanans.

14
15
16 For the foregoing reasons, M.C.A. § 77-1-121 is unconstitutional. The Board's lease is *void*
17 *ab initio*. This Court should declare the same and remand the matter to the Board with instructions
18 to comply with MEPA before entering into a lease for Otter Creek which conveys the states' mineral
19 interests and authorizes ground disturbing activities on Otter Creek.

20 21 GENERAL ALLEGATIONS

22 I. JURISDICTION, VENUE AND STANDING

23 1. Jurisdiction is based on, *inter alia*, the Montana Constitution, Article II Section 3,
24 Article IX Sections 1, 2 & 3, the Montana Declaratory Judgment Act, 27-8-101 et seq. Venue is
25 proper in this district because (to be determined).[under 27-8-201 venue appears to be appropriate
26 in any "court of record"], and MEPA, M.C.A. § 75-1-101 et. seq. Defendant Montana Board of

Land Commissioners, a subdivision of the State of Montana is the state Board with legal responsibility for managing state trust lands, and is the state entity that approved and entered into the leases that are the subject of the complaint. Defendant Arch Coal Inc. is a Missouri corporation, the nation's second largest coal producer, and the parent company for Ark Land Company. Ark Land Company is a wholly-owned subsidiary of Arch Coal and is the lessee for the Otter Creek leases that are the subject of this complaint. Under the Uniform Declaratory Judgment Act, these Defendants have an interest in the subject matter of this lawsuit and are a proper and necessary party to this suit.

2. Plaintiff Northern Plains Resource Council, Inc. (Northern Plains) is a Montana non-profit public benefit corporation pursuant to Mont. Code Ann. § 35-2-101, *et seq.*, and at all times pertinent hereto has had its principal office in Yellowstone County, Montana. This action is brought on behalf of the organization and its members.

3. Members of the Plaintiff's organization reside in southeastern Montana, including in the vicinity of Otter Creek. Members live in and regularly use and enjoy the aesthetic qualities, wildlife, and lifestyle opportunities in southeastern Montana and have been actively involved in the conservation of these resources for over three decades.

4. Northern Plain's members are directly and adversely affected by the decision to lease Otter Creek. The environmental, health, aesthetic, economic, and recreational interests of Northern Plains' members have been, are being, and will be adversely affected by the decision to lease Otter Creek without adequate environmental review. Members use and enjoy the waters of southeastern Montana for irrigation, stock water and recreational pursuits that will be affected by mining. Some of the surface and ground water that will be adversely affected by coal mining at Otter Creek will eventually end up in the Tongue River, which Plaintiff's members use for irrigation. Plaintiff's members live in, recreate in, and appreciate Otter Creek and surrounding

lands, and the Tongue River Valley, and intend to do so in the immediate future.

1 5. Because Northern Plains' members live in the vicinity of Otter Creek, and because
2 they use water that may be affected by Otter Creek, and because they have personal direct ties to
3 the area, their interests in this matter and injuries arising from the lease of Otter Creek are
4 different from the interests of other Montana citizens.

5
6 6. Northern Plains is a grassroots organization made up of concerned community
7 members. Northern Plains's mission is to inform residents of the region about activities that
8 endanger the health and quality of life for current and future residents through education and
9 citizen empowerment and to advocate for actions to protect and restore the economic, social and
10 environmental resources of southeastern Montana. Plaintiff Northern Plains has standing in this
11 suit to protect its own interests and those of its individual members in a representative capacity.
12 Northern Plains's organizational purposes are adversely affected by the Board's decision to lease
13 Otter Creek without environmental review. The lack of adequate information about environmental
14 impacts before leasing impedes the organizational mission of Northern Plains by limiting its right,
15 and the rights of its members, to understand the consequences of the actions of Montana state
16 government, to inform the members and the general public about such matters, and to effectively
17 participate in decisions affecting the states' public lands and associated natural resources.
18

19
20 7. The National Wildlife Federation ("NWF") is the nation's largest conservation
21 advocacy and education organization with members in every state, including over 5,000 members
22 in Montana. NWF's mission is to educate, inspire, and assist individuals and organizations of
23 diverse cultures to conserve wildlife and other natural resources and to protect the Earth's
24 environment in order to achieve a peaceful, equitable, and sustainable future. Individual NWF
25

members are concerned with the conservation of irreplaceable natural resources and sustaining the nation's rich fish and wildlife heritage. Individual NWF members hunt, fish and recreate throughout Montana, including the Otter Creek drainage, and intend to continue to do so in the future. Founded in 1936, NWF is a non-profit, tax-exempt corporation with its headquarters in Reston, Virginia and a regional natural resource center in Missoula, Montana. NWF brings this suit on its behalf and on behalf of its members, who have actual injury based on the allegations contained herein, and such injuries are distinct from those of the general public. The injury allegations contained in paragraphs 5 and 6.

II. Statutory and Constitutional Provisions Relevant to the Complaint.

8. The Montana Constitution declares in Article II, section 3 that: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways."

9. The Montana Constitution declares in Article IX, section 1 that: "The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations..... The legislature shall provide for the administration and enforcement of this duty... [and] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." The aforementioned rights in Articles II and IX are referred to herein as Montana's Constitutional Environmental Rights.

10. Articles II and IX are conjoined. Articles II and IX provide substantive constitutional

rights and duties. The rights and duties imposed by the Environmental Constitutional Rights are anticipatory and preventative. These provisions also impose affirmative obligations on the Montana Legislature to provide statutory remedies to implement these public health and environmental protections and to preserve Montana's priceless natural heritage. In addition, the Montana Constitution contains a fundamental right in Article II, section 8 to participate in government that is implicated by the actions of the Board described herein.

11. The Montana Legislature has a constitutional duty to enact statutes to maintain and improve a clean and healthful environment, and to provide remedies to enforce these protections. The Montana Environmental Policy Act (MEPA) is one such statute established by the Montana Legislature in order to effectuate its constitutional obligations under Article II § 3 and Article IX of the Montana Constitution. MEPA reads in part "The legislature, mindful of its constitutional obligations under Article II, section 3, and Article XI of the Montana constitution has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered. The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council." Mont. Code Ann. § 75-1-102 (2009).

12. MEPA also states in Mont. Code Ann. § 75-1-103, in relevant part:

Policy.

(1) The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, recognizing the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

13. MEPA is a principle tool by which the State seeks to ensure that constitutional guarantees are recognized and integrated into every decision affecting Montana's environment. MEPA also effectuates the Article II, Section 8 right to participate in government. MEPA also contains procedural requirements for disclosure of environmental impacts and participation by citizens in decision-making, including the right to comment upon and discuss the full

Complaint 8

environmental impacts of actions before decisions are made.

1 14. In 2003, the Montana Legislature enacted an amendment to MEPA that provides:

2 "[T]he department and board are exempt from the provisions of Title 75, chapter 1, parts 1 and 2,
3 when issuing any lease or license that expressly states that the lease or license is subject to further
4 permitting under any of the provisions of Title 75 or 82." Mont. Code Ann. § 77-1-121 (2) (2009).
5 Title 75 includes specific permitting for water and air quality, waste management, etc. Title 82
6 includes permitting for minerals, oil and gas.
7

8 15. M.C.A. § 77-1-121 purports to exempt "any lease" from the EIS and other procedural
9 requirements of MEPA when the lease is subject to further permitting under the Montana Strip
10 Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act. All coal leases
11 are subject to permitting standards under the Montana Strip Mine Siting Act and the Montana
12 Strip and Underground Mine Reclamation Act. The Legislature enacted this statute because
13 absent the exemption, leases of state lands and resources are state actions with environmental
14 impacts that are subject to MEPA. The statute serves no other purpose other than to exempt an
15 entire class of actions from MEPA where those actions are otherwise required to comply with
16 MEPA. Because the Otter Creek lease would be subject to further coal permitting standards under
17 M.C.A. § 77-1-121, the Board did not comply with any provision of MEPA before entering into
18 the leases.
19
20

21 **III. Factual Allegations Regarding the Otter Creek Leases**

22 16. Located southeast of the town of Ashland in western Powder River County, the Otter
23 Creek property contains over 1.2 billion tons of recoverable coal reserves. Approximately one-half
24 of the reserve is located on what is now Montana school trust land. The other half of the coal
25
26

reserve is privately owned, with the vast majority held by Arch Coal Company (Arch). The ownership pattern resembles a checkerboard, with Arch and the State owning alternating sections.

Both parties must participate for the coal to be fully developed.

17. In 2008, the Board authorized the Department of Natural Resources and Conservation (DNRC) to perform an economic valuation of the coal reserves. DNRC contracted with Norwest Corporation to produce the Montana Otter Creek State Coal Valuation("the appraisal"), which was submitted to the Board in April, 2009.

18. The appraisal was distributed for public comment pursuant to §77-3-312. The comment period closed on July 31, 2009. Northern Plains and others provided extensive comments raising the concerns that form the basis for this lawsuit.

19. Northern Plains submitted two sets of detailed comments raising a number of issues including flaws in the economic analysis, the lack of any environmental review under MEPA, violations of the constitutional right to a healthy environment provisions and the failure to properly consider the immediate and long term environmental, economic and social consequences of leasing Otter Creek for coal development. Northern Plains urged the Board to reject the appraisal and not proceed with the lease process. The majority of the comments received by the Board were in opposition to the lease.

20. On November 16, 2009 the Board approved the appraisal and instructed the staff to prepare a draft lease and a bonus bid package.

21. On December 21, 2009 the Board approved a draft lease, set a minimum bid price of 25 cents per ton and set a 45 day limit on the bid with a deadline of February 8, 2010. No bids were received. However, Ark Land Company (Ark), a subsidiary of Arch Coal, submitted a letter

of interest proposing a lower bonus bid and different royalty payment.

1 22. On February 16, 2010, the Board voted 3-2 to lower the minimum bid price to 15 cents
2 per ton and set a deadline of March 16, 2010 to receive bids. Ark was the lone bidder.

3 23. On March 18, 2010, the Board voted 3-2 (Attorney General Bullock and
4 Superintendent Juneau dissenting) to approve the lease of the Otter Creek tracts to Ark for the
5 offered bonus bid of \$85,845,110. The decision to approve the Otter Creek lease has
6 environmental consequences, the full extent of which were not analyzed by the Board, and
7 disclosed to the public before the decision to lease was made.
8

9 24. Northern Plains and others commented at these Land Board meetings, raising many
10 of the issues set forth herein and opposing the lease of Otter Creek as approved by the Board.
11

12 25. The Board entered into fourteen separate but identical leases with Ark Land Company,
13 denoted Leases C - 1103-10 through C 1116-10 (hereafter referred to as the Otter Creek Lease.
14 The Otter Creek Lease (¶1) grants Ark the right to mine "all lands" covered by the leases. The
15 lease (¶19) requires compliance with applicable laws including the Montana Strip Mine Siting Act
16 and the Montan Strip and Underground Mine Reclamation Act, so long as compliance does not
17 "does not deprive Lessee of an existing property right recognized by law." The right to mine all of
18 the land is an existing property right upon signing of the lease. The lease takes effect on March
19 18,2010 and is granted for a primary term of ten years "and so long thereafter as coal is produced
20 from such lands in commercial quantities." ¶ 3. The lease further guarantees Ark the right to mine
21 in the event that the state chooses to sell, lease, transfer or otherwise dispose of any interest in the
22 leased property.
23
24

25 26. The State of Montana has made an irretrievable and irreversible commitment of
26

resources in approving and signing the Otter Creek Leases. Board member Secretary of State
1 Linda McCullough told the public in a letter dated April 10, 2010 to Northern Plains' member
2 Linda Orr that "At the peak of mine production, budget estimates project the state will be
3 receiving approximately \$500 million per biennium, not counting what local governments will
4 receive." Thus the State of Montana already expects to receive substantial revenues from the mine
5 at Otter Creek,
6

7 27. In a letter dated April 2, 2010, Governor Schweitzer has calculated that, based upon
8 the Board's decision to lease Otter Creek Montana will gain economic benefits from the actual
9 mining: "Assuming a projected 25-year life of the mine, it is estimated that \$5.34 billion in tax
10 revenues and royalties will be paid to the state treasury. In addition, the mine will provide
11 hundreds of good paying jobs for Southeastern Montana." These statements and others made by
12 the Board, coupled with the terms of the lease indicate that the Board has made an irretrievable
13 and irrevocable commitment of resources when it entered into the Otter Creek leases with Ark.
14 The Governor has acknowledged that the leases will cause environmental damage and called for
15 creation of a five million dollar fund to indemnify people from damages caused by the mining.
16
17

18 **IV. Factual Allegations Regarding the Environmental Consequences of Leasing** 19 **Otter Creek.**

20 **A. Direct and Indirect Effects of Coal Mining**

21 28. Development of the state's coal resource at Otter Creek will may have significant
22 environmental impacts on the land and water in the Otter Creek area. The project may result in
23 the largest new coal mine in North America. The Board is aware of the general nature of these
24 impacts but has not analyzed them in adequate detail before deciding to lease.
25
26

29. Terrestrial impacts of mining at Otter Creek include, but are not limited to, loss of wildlife habitat, destruction of vegetation, and direct mortality of wildlife. Numerous species inhabit the Otter Creek area and they will be adversely affected by the development.

30. Mining at Otter Creek will adversely affect ground and surface water resources. Large sections of the coal deposits at Otter Creek lie within alluvial valleys. Massive strip mines require dewatering of coal seam aquifers requiring disposal of large quantities of ground water. In addition, coal mining can cause impacts to surface waters. The ground and surface waters in Otter Creek are hydrologically connected to the Tongue River, the most important source of irrigation water in the area, as well as an important riverine ecosystem and will cause impacts to surface waters.

31. Coal mining at Otter Creek will have impacts to air quality from the use of heavy equipment and from the mining and transportation of the coal.

32. Coal mining at Otter Creek will have socio-economic impacts on the farming and ranching operations in the area, on small towns throughout southeastern Montana, and on the Northern Cheyenne Tribe and reservation. The socio-economic impacts of major coal mines can have adverse consequences by creating a "boom and bust" cycle that affects local education, public services, crime, jobs and other facets of life that are important to small communities. The socio-economic impacts of coal development at Otter Creek is likely to have short and long term adverse impacts on the socio-economic aspects of farms and communities in southeastern Montana.

33. Coal mining at Otter Creek requires the construction of the Tongue River Railroad. The U.S. Surface Transportation Board has already determined that the Tongue River Railroad

will have significant environmental impacts. The impacts caused by the construction of the Tongue River Railroad are directly, indirectly and cumulative related to and proximately caused by the impacts that will occur from mining coal at Otter Creek.

B. Climate Change Impacts of Coal Combustion

34. Climate change is the term scientists use to describe the heat trapping effects of greenhouse gases (GHG) emitted from power plants, industries, motor vehicles and other sources. Montana, particularly eastern Montana, will be subject to profound climatological changes. The impacts of those changes will affect hydrological cycles, surface and subsurface water supplies, soil, wildlife habitat, growing seasons, prevalence of pests, and cause many other significant environmental and socio-economic consequences for Montanans and our landscape.

35. Carbon dioxide (CO₂) accounts for 80% of global emissions the GHG emitted to the atmosphere.

36. Coal is the most carbon-intensive fuel on earth. Coal combustion accounts for 40% of the CO₂ emissions produced in the United States.

37. There is currently no commercially demonstrated technology to capture and permanently sequester CO₂ underground. Pilot projects are underway in Montana and elsewhere to determine whether carbon capture and sequestration (CCS) is technically and economically feasible.

38. The U.S. Environmental Protection Agency has published a formal "endangerment finding" under the Clean Air Act concluding that GHG emissions pose a clear and present danger to public health and welfare. Among other things, EPA found that CO₂ concentrations in earth's atmosphere are the highest they have been in over 650,000 years.

39. Methane is another greenhouse gas that is twenty time more potent than CO2. Coal mining is the second leading source of methane emissions.

40. According to the recent report of the United States Global Research Program (USGRP), climate change is already having serious adverse impacts throughout the United States and in the West in particular. Key findings of the USGRP include the following:

- Global warming is unequivocal and primarily human-induced. Global temperature has increased over the past 50 years. This observed increase is due primarily to human-induced emissions of heat-trapping gases.

- Climate changes are underway in the United States and are projected to grow. For example, increases in heavy downpours, rising temperature and sea level, rapidly retreating glaciers, thawing permafrost, lengthening growing seasons, lengthening ice-free seasons in the ocean and on lakes and rivers, earlier snowmelt, and alterations in river flows. In the Western United States, scientists have already documented climate-related changes in river hydrology resulting in earlier peak spring flows and diminished late summer flows, which adversely affects irrigated agriculture and riverine ecology.

- Widespread climate-related impacts are occurring now and are expected to increase. Climate changes are already affecting water, energy, transportation, agriculture, ecosystems, and health. These impacts are different from region to region and will grow under projected climate change.

- Threats to human health will increase. Health impacts of climate change are related to heat stress, waterborne diseases, poor air quality, extreme weather events, and diseases transmitted by insects and rodents.

• Climate change will stress water resources. Drought, related to reduced precipitation, increased evaporation, and increased water loss from plants, is an important issue in many regions, especially in the West. Floods and water quality problems are likely to be amplified by climate change in most regions. Declines in mountain snowpack are important in the West and Alaska where snowpack provides vital natural water storage.

• Coastal areas are at increasing risk from sea-level rise and storm surge.

• Crop and livestock production will be increasingly challenged. Agriculture is considered one of the sectors most adaptable to changes in climate. However, increased heat, pests, water stress, diseases, and weather extremes will pose adaptation challenges for crop and livestock production.

• Climate change will interact with many social and environmental stresses. Climate change will combine with pollution, population growth, overuse of resources, urbanization, and other social, economic, and environmental stresses to create larger impacts than from any of these factors alone.

• Thresholds will be crossed, leading to large changes in climate and ecosystems. There are a variety of thresholds in the climate system and ecosystems. These thresholds determine, for example, the presence of sea ice and permafrost, and the survival of species, from fish to insect pests, with implications for society. With further climate change, the crossing of additional thresholds is expected.

• Future climate change and its impacts depend on choices made today. The amount and rate of future climate change depend primarily on current and future human-caused emissions of heat-trapping gases and airborne particles.

41. The effects of climate change are already visible in Montana in the melting of the glaciers at Glacier National Park; in reduced snowpack in the Rockies; in lower stream flows in southeastern Montana, and the loss of coldwater trout habitat in many river basins; in the destruction of forests by pine bark beetle infestations; in increasing summer heat waves and more air pollution; in less water for irrigation and less soil moisture for pastures, native plants and grasslands; in shifting ranges of native species of plants and animals; and in the spread of pests and invasive species. The mining and combustion of Otter Creek coal is a substantial new source of GHG at a time when the United States and Montana are committed to reducing GHG.

V. COUNT I

42. Plaintiffs re-allege all previous allegations as if set forth in full.

44. The Board does not adequately understand the nature, extent, timing and scope of the aforementioned environmental consequences of its decision to lease Otter Creek, and therefore did not disclose to the public the consequences of its decision to lease Otter Creek because the Board did not comply with MEPA before making an irretrievable commitment of resources when it entered into the leases with Ark.

45. The decision to lease Otter Creek constitutes an irreversible commitment of resources which will cause significant environmental consequences.

46. The Board failed to weigh and balance the environmental and socio-economic impacts of leasing of different alternatives pertaining to Otter Creek, including but not limited to leasing only portions of Otter Creek, deferring leasing until carbon sequestration technology is economically viable, or until markets change, imposing non-surface occupancy stipulations on the leases, imposing environmentally-protective stipulations on the leases, and/or not leasing (no

action) Otter Creek.

1 47. The decision to lease Otter Creek is a major state action with significant
2 environmental consequences and is therefore subject to MEPA.

3 48. The Board relied upon M.C.A. § 77-1-121 to exempt the Otter Creek leases. Absent
4 the Board's application of M.C.A. § 77-1-121, the Otter Creek leases would have been subject to
5 MEPA and the Board would have been required to comply with MEPA before entering into the
6 lease.
7

8 49. Montana's Constitutional Environmental Rights are fundamental right. So to is the
9 right to informed participation in governmental decision-making contained in Article II, Section 8.
10 The Board's decision to lease Otter Creek and to rely upon M.C.A. § 77-1-121 implicates and
11 infringes upon those rights as they are held by members of Plaintiffs' organizations. The Montana
12 Supreme Court has declared that statutes that infringe upon or implicate Montana's Constitutional
13 Environmental Rights are subject to strict scrutiny. Strict scrutiny requires that the state
14 demonstrate a compelling state interest narrowly tailored to effectuate that purpose by taking the
15 least environmentally damaging path to achieve that purpose. Strict scrutiny must be applied to
16 M.C.A. § 77-1-121.
17
18

19 50. No *compelling* state purpose is served by exempting the Otter Creek lease decision
20 from MEPA review before irreversibly committing the state to this course of action in March,
21 2010. Exempting the Otter Creek leases from MEPA is contrary to the compelling state interests
22 served by MEPA. It is contrary to the compelling state interests served by the right to participate
23 in Article II, section 8 of the Montana Constitution. Montana has owned the Otter Creek minerals
24 for over 12 years and has been capable of performing a MEPA analysis before leasing the tracts
25
26

for over a decade. Thus Montana could have complied with MEPA and reached a more informed decision about the costs and benefits of leasing Otter Creek. A more informed decision about the consequences of creating what may be the largest coal mine in North America, and therefore having the ability to modify or forego mining all or part of Otter Creek, or imposing other mitigation at the lease stage, benefits all Montanans, now and in the future.

51. M.C.A. § 77-1-121 is not narrowly-tailored to effectuate any identifiable, let alone "compelling" state interest. The statute is a blunt instrument that effectively repeals MEPA at the most critical "go/no go" stage of the mineral leasing process, blinding the Board to the consequences of its action and depriving the public of the opportunity to meaningfully participate in a decision with profound implications for Montana's future. Less draconian options are available for modifying the MEPA process at the leasing stage to take account of what is known and not known. The legislature failed to consider such options.

52. M.C.A. § 77-1-121 is unconstitutional as applied to the Otter Creek leases.

53. Alternatively, M.C.A. § 77-1-121 does not survive middle-tier or any other constitutional scrutiny and is therefore unconstitutional because the statute's classification (in this case exempting one class of activities from MEPA) is not reasonably related to a substantial government interest. Any such interest is not outweighed by the infringement and burden upon Plaintiffs' members constitutional rights as set forth herein.

54. Because the statute is unconstitutional, and because the Board made a decision in reliance upon an unconstitutional statute and did not comply with MEPA, the Otter Creek leases were issued in violation of the Montana constitutional and statutory law and are therefore *void ab initio* and of no force and effect.

IV. COUNT IV.

55. Plaintiffs reallege all previous paragraphs as if set forth in full.

56. The Board's decision to enter into the Otter Creek Leases is state action with environmental consequences that is subject to MEPA.

57. Because M.C.A. § 77-1-121 is unconstitutional as applied herein, the Board has no lawful exemption from MEPA and must therefore comply with MEPA and determine, *inter alia*, whether the Otter Creek Leases require preparation of an Environmental Impact Statement.

58. Because the Otter Creek Leases were entered into in violation of MEPA, they are *void ab initio* and of no force and effect.

VII. REQUEST FOR RELIEF

Wherefore Plaintiffs request the following relief:

1. That the Court enter a Declaratory Judgment that M.C.A. §77-1-121 is unconstitutional as applied herein, and that the Board's decision to lease Otter Creek is unlawful.

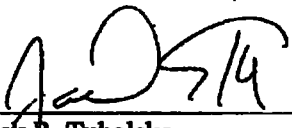
2. That the Otter Creek leases are *void ab initio* and of no force and effect.

3. That the matter is remanded to the Board with instructions that the Board must comply with MEPA before entering into any future leases for coal mining at Otter Creek.

4. For Plaintiffs costs and attorney fees.

5. For all other relief that the Court deems just and proper.

Dated this 12th day of May, 2010.



Jack R. Tuholske



Patrick Parenteau

Attorneys for the Plaintiffs

Douglas L. Honnold
Jenny K. Harbine
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
dhonnold@earthjustice.org
jharbine@earthjustice.org

Counsel for Plaintiffs

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT

POWDER RIVER COUNTY

MONTANA ENVIRONMENTAL
INFORMATION CENTER
and SIERRA CLUB,

Plaintiffs,

v.

MONTANA BOARD OF LAND
COMMISSIONERS, ARK LAND COMPANY,
and ARCH COAL, INC.

Defendants.

Case No.

Judge:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the decision by the Montana Board of Land Commissioners ("Land Board") to lease the State-owned Otter Creek coal reserves in the northern Powder River basin in southeast Montana without first examining the potentially devastating environmental consequences and economic impacts of its decision.

2. The Otter Creek coal tracts are located near Ashland, Montana, where Otter Creek flows into the Tongue River. The Custer National Forest surrounds the Otter Creek tracts to the north, east, and south, and the Northern Cheyenne Reservation is approximately 10 miles west of the tracts' eastern boundary. The Tongue River Valley in the vicinity of the Otter Creek coal tracts is a rich agricultural production area and home to abundant wildlife species.

3. If constructed, the Otter Creek strip mine would exploit a 1.3 billion-ton coal reserve, almost half of which is owned by the State. In total, Otter Creek coal will emit 2.4 billion tons of carbon dioxide ("CO₂"). These significant CO₂ emissions will spur global warming and its potentially disastrous impacts globally and in Montana. As Nobel Laureate and University of Montana Professor Dr. Steven Running stated, "[f]rom a state carbon emissions point of view, [leasing the Otter Creek coal tracts] is the single most important decision in the history of Montana. ... Indeed, the ability of the global community to avert the worst-case climate change scenarios comes down to decisions like this one at the local level in each country." Steven W. Running, Op-Ed: Montana at carbon emissions crossroads, Billings Gazette (Feb. 16, 2010) (emphasis added), at http://billingsgazette.com/news/opinion/guest/article_99b47ee8-1aae-11df-b4c8-001cc4c002e0.html (last visited May 12, 2010).

4. The strip mine also has significant potential to degrade the quality of surface water and groundwater, destroy hydrologic functions essential to agricultural production, and degrade or destroy wildlife habitat.

5. The principle legal mechanism to examine these types of environmental consequences is the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. § 75-1-101, et seq. One of MEPA's primary purposes is "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of

humans.” Id. § 75-1-102(2). MEPA does so by requiring State decisionmakers to fully examine the impacts of proposed actions and to evaluate alternatives that may reduce or avoid those impacts. Id. § 75-1-201. In this way, State decisionmakers may fulfill their constitutional obligation to prevent unreasonable environmental degradation. See Mont. Const., Art. II, sec. 3; id. Art. IX, sec. 1; see also Mont. Code Ann. § 75-1-102 (MEPA intended to implement State’s constitutional obligations with respect to environmental protection).

6. No MEPA analysis has been conducted for the Otter Creek coal lease.

Notwithstanding the significant environmental consequences of leasing state land for coal mining and a constitutional mandate to prevent environmental degradation, the 2003 Montana Legislature adopted a statute to exempt coal leases from MEPA when the activities authorized by such leases will undergo further environmental permitting. See Mont. Code Ann. § 77-1-121(2). This exemption—for which the Legislature demonstrated no compelling state interest—unconstitutionally impinges on the right of Montanans to a clean and healthful environment. See Mont. Const., Art. II, sec. 3.

7. The exemption foreclosed the State’s consideration of options at the time of leasing that could avoid the most serious environmental impacts of coal mining, in particular, the option of not leasing the coal at all. Further, it is at the lease stage that the State has the ability to impose conditions that could protect water resources, preserve private property rights, and avoid global warming impacts, for example by restricting the lessee’s ability to sell coal to end users that do not capture and store their CO₂. Meaningful consideration of alternatives at the lease stage could also reveal options for increasing state revenue, such as leasing the Otter Creek tracts in stages. As a result of the MEPA exemption, the Land Board leased the Otter Creek coal tracts for strip mining without full knowledge and disclosure of the environmental and economic

consequences of both the action it took and potential alternatives to it.

8. Likewise, the failure of the Land Board to give weight to the unexamined, but potentially destructive, environmental consequences of the Otter Creek coal lease violated the Land Board's public trust obligation to manage state lands in the best interests of the people of Montana.

9. For these reasons, Plaintiffs Montana Environmental Information Center ("MEIC") and Sierra Club respectfully request that this Court set aside the Otter Creek coal lease and direct the Land Board to examine the environmental consequences of its decision.

JURISDICTION AND VENUE

10. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202, Montana Constitution Article II, section 3 and Article IX, section 1, and MEPA, Mont. Code Ann. § 75-1-101, et seq.

11. This Court has jurisdiction over Plaintiffs' claims pursuant to Mont. Code Ann. § 3-5-302(1)(b), (c). See also Mont. Env'l Info. Ctr. v. DEQ, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (exercising jurisdiction over claim that statutory provision was unconstitutional); Ravalli County Fish & Game Ass'n v. Dep't of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995) (exercising jurisdiction over claim that agency failed to comply with MEPA); Friends of the Wild Swan v. Dep't of Natural Res. and Conservation, 2005 MT 351, 330 Mont. 186, 127 P.3d 394 (exercising jurisdiction over claim that state agency decision violated public trust).

12. Venue is proper in this District under Mont. Code Ann. § 75-1-108 because the Otter Creek tracts that are the subject of this action are in Powder River County.

PARTIES

13. Plaintiff MEIC is a member-supported advocacy and public education

organization based in Helena, Montana, that works to protect and restore Montana's natural environment. Since its founding in 1973, MEIC has lobbied and litigated both at the state and federal level to prevent degradation of air and water quality and natural resources. Recent MEIC advocacy efforts have focused on curbing activities that contribute to global warming, including coal combustion at power plants. With respect to the Otter Creek coal lease, MEIC has led efforts to inform the public, elected officials, and responsible agencies about the global warming and environmental effects of strip mining coal. At every opportunity for public involvement in the leasing process, MEIC has submitted comments aimed at promoting alternatives to the State's leasing of the Otter Creek coal tracts, and thereby avoiding environmental degradation and greenhouse gas emissions from the coal's combustion that contribute to global warming and balancing the long term interest of the trust against short term revenue.

14. Plaintiff Sierra Club is a nationwide conservation organization with more than 1.3 million members and supporters, 2,000 of whom belong to the Montana Chapter. The Sierra Club is America's oldest and largest grassroots environmental organization. The mission of the Sierra Club is: "To explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments." Sierra Club is engaged in a nationwide campaign to champion clean energy in the face of an unprecedented rush to promote coal mining and construct new coal-fired power plants. With respect to the Otter Creek coal lease, the Sierra Club has engaged in organizing efforts aimed at educating the public about how combustion of Otter Creek coal would significantly contribute to global warming. The Sierra Club has provided written and oral testimony to the Land Board to urge it not to lease the Otter Creek tracts.

15. The Land Board's decision to lease the State-owned Otter Creek coal tracts for strip mining adversely affects Plaintiffs' organizational interests in protecting air and water quality, protecting landscapes from the ravages of strip mining, and averting a global warming disaster. The Land Board's leasing decision adversely impacts Plaintiffs' members and their shared interest in clean and healthy air and water quality, landscape conservation, and a healthy climate. Plaintiffs' members include landowners who live and work in and near Ashland, Montana and individuals who fish, hunt, and recreate in and around the area that will be adversely affected by the proposed coal mine:

16. The Land Board's leasing decision particularly injures the interests and property of MEIC member Art Hayes, Jr., who resides at 208 Hanging Woman Creek Road, Birney, Montana. Art Hayes is a cattle rancher and president of the Tongue River Water Users Association. Mr. Hayes would be harmed by mining at Otter Creek due to its adverse air quality and socio-economics impacts to the region. Mr. Hayes will also be harmed by the Tongue River Railroad, which would be constructed to transport Otter Creek coal. If the railroad runs from Decker to Miles City, as planned, five miles of track would traverse Mr. Hayes' property. Further, Mr. Hayes depends on precipitation to maintain rangeland productivity of his property. Global warming, spurred by coal mining, may injure Mr. Hayes' cattle operation due to diminished precipitation.

17. Defendant Board of Land Commissioners was established pursuant to Article X, section 4, of the Montana constitution, and consists of the governor, superintendent of public instruction, auditor, secretary of state, and attorney general. The Land Board exercises "general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the

leasing, use, sale, and disposition of those lands or otherwise coming under its administration.”

Mont. Code Ann. § 77-1-202. Its offices are located in Lewis and Clark County.

18. Defendant Ark Land Company is a wholly owned subsidiary of Arch Coal, Inc., and is incorporated in Delaware.

19. Defendant Arch Coal, Inc. is a publicly traded coal mining and processing corporation incorporated in Delaware and headquartered in St. Louis, Missouri.

FACTUAL BACKGROUND

I. THE LAND BOARD’S DECISION TO LEASE THE OTTER CREEK COAL TRACTS

A. The State’s Acquisition of the Otter Creek Coal Tracts

20. The State of Montana acquired the Otter Creek coal tracts (referred to as Otter Creek tracts 1, 2, and 3) from the federal government as part of the federal government’s purchase and retirement of hard-rock mining claims in the New World Mining District, northeast of Yellowstone National Park. In 1997, Congress offered Montana a choice: the State could take federal mineral rights valued at \$10 million, or the Otter Creek tracts. See Dep’t of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 503, 111 Stat. 1, 75 (1997). Although the Otter Creek tracts were recognized as an ecologically and hydrologically sensitive area with no existing transportation infrastructure to service a major coal mining operation, then-Governor Marc Racicot was insistent that the State should be given the Otter Creek tracts.

21. The federal conveyance was approved by the Land Board on May 20, 2002 and certified by Governor Judy Martz in Executive Order 12-02. See http://dnrc.mt.gov/trust/MMB/otter_creek/2.%20General/Transfer%20Documents/Otter%20Creek%20Transfer%20Documents.pdf (last visited May 12, 2010). Pursuant to Article X, Section 11 of the Montana

Constitution and the Enabling Act, 25 Stat. 676 (1889), the tracts became part of the public trust for the benefit of common schools.

22. The Otter Creek coal tracts have a checkerboard ownership pattern. Otter Creek tracts 1, 2, and 3 total 7,623 acres and 572 million tons of recoverable coal. 2009 Norwest Appraisal, p. 3-11. Great Northern Properties is the majority owner of the privately held land in the Otter Creek area. The privately and State-owned parcels together hold approximately 1.3 billion tons of coal. Id. The checkerboard ownership makes it unlikely that the privately owned coal tracts could be developed unless the State leased its coal for development.

B. The Leasing Process

1. Norwest Appraisal

23. In preparation for leasing the Otter Creek tracts, Montana's Department of Natural Resources and Conservation ("DNRC") commissioned a "Coal Valuation" report from Norwest Corporation to determine the fair market value of the State's reserves. The fair market value is used to determine the bonus bid—an upfront payment to the State based on the estimated value and amount of recoverable coal. Lessees also pay the State a royalty on each ton of coal that is mined.

24. The Norwest appraisal was completed in January 2009. Norwest employed two methodologies for determining the value of Montana's Otter Creek coal holdings. Using the "comparable lease sales approach," Norwest concluded that the State's 572 million tons of recoverable coal is worth approximately \$30.8 million, or approximately \$0.05/ton. 2009 Norwest Appraisal, p. E-2. Using the "income approach," Norwest estimated the coal's value at \$37.3 million, or \$0.07/ton. Id. Accordingly, "Norwest conclude[d] that a bonus bid between \$0.05 and \$0.07/ton of recoverable coal, as determined through the Comparable Lease Sales and

Income approaches, represents the fair market value range for the Otter Creek Tracts 1 through 3.”

25. Other recent coal lease sales in the Powder River Basin have garnered exponentially higher upfront bonus bids. Bonus bids for Wyoming coal over the last decade averaged \$0.79/ton. BLM leased coal for Montana’s West Roundup mine in 2005 for a bonus bid of \$0.97/ton.

26. According to the Norwest appraisal, the cost to develop the Tongue River Railroad is the primary factor deflating the value of the Otter Creek tracts. Norwest estimated that the lack of a railroad reduced the value of Otter Creek coal by up to \$187 million.

27. Norwest further devalued Otter Creek coal based upon its relatively high sodium content, which is less desirable for burning at power plants due to slagging problems it causes in most electric generating plant boilers. See 2009 Norwest Appraisal, p. 2-9.

28. In comments on the Norwest appraisal, members of the public, including MEIC and Sierra Club, strongly urged the Land Board not to lease the Otter Creek coal tracts. MEIC and Sierra Club notified the Land Board of its obligation to first undertake an analysis under MEPA to evaluate the significance of the environmental effects of leasing the coal tracts. They also argued that leasing the Otter Creek tracts for strip mining would violate the Land Board’s public trust and constitutional duties to prevent unreasonable environmental degradation.

29. In November 2009, just before the Board was supposed to vote on whether to lease its coal and on what minimum bid price to set, Great Northern Properties announced that it had leased its Otter Creek coal parcels to Arch Coal for a bonus bid of \$0.10 per ton.

2. December 21, 2009 Land Board Meeting

30. On December 21, 2009, after MEIC, Sierra Club, and many others urged it not to

do so, the Land Board voted 4-1 to seek bids from coal companies interested in mining the Otter Creek tracts. At that meeting, Secretary of State Linda McCulloch made a motion to set the minimum acceptable bonus bid amount at \$0.25 per ton. Attorney General Steve Bullock sought to amend the motion, arguing that the coal lease should garner a higher bonus bid than \$0.25 per ton, but the amendment failed.

31. Only Superintendent of Public Instruction Denise Juneau voted against the decision to solicit bids. Superintendent Juneau cited the Board's obligation to consider the well-being of future as well as present generations, and stated that Montana's landscape and environmental health are part of that consideration.

32. Governor Brian Schweitzer offered a lengthy justification for his vote to solicit bids for the Otter Creek coal tracts, notwithstanding his acknowledgment of global warming's harmful impacts. Governor Schweitzer argued that while coal combustion results in CO₂ emissions that contribute to global warming, it is the federal government, not Montana, that should lead the way in reducing those emissions.

33. The Land Board set a deadline of February 8, 2010 for companies to submit bids for the Otter Creek coal lease, with a minimum bonus bid of \$0.25 per ton.

3. February 16, 2010 Land Board Meeting

34. No bids were received before the February 16, 2010 Land Board meeting. The only response to the lease offering came from Ark Land, which sent a single paragraph letter to the Land Board stating, without support, that the minimum price was set too high. Within days, DNRC recommended that the Land Board lower the minimum bonus bid amount.

35. The overwhelming majority of public comments the Land Board received at the February 16, 2010 Land Board meeting were opposed to mining Otter Creek.

36. Nevertheless, Secretary of State McCulloch again made a motion to offer the Otter Creek coal tracts for lease, this time lowering the minimum bonus bid by 40 percent, to \$0.15 per ton.

37. Attorney General Bullock argued that the Board was required to obtain full market value for the coal and that a lower bid amount would violate that duty. He joined Superintendent Juneau in voting against offering the Otter Creek tracts for lease at \$0.15 per ton.

38. On March 16, 2010, Ark Land Company, a wholly owned subsidiary of Arch Coal, offered the minimum bonus bid of \$0.15 per ton.

4. March 18, 2010 Land Board Meeting

39. On March 18, 2010, the Land Board voted 3-2 to accept Ark Land's bid.

40. Never at any point of the leasing process did the Land Board consider any alternatives to leasing Otter Creek Tracts 1, 2, and 3, including: staged leasing of the tracts to boost state revenue; imposing lease conditions to protect water quality and private property rights; requiring the lessee to condition sales of Otter Creek coal on avoiding or mitigating CO₂ emissions; preventing export of Otter Creek coal to countries with lax clean air laws; requiring the lessee to avoid or mitigate CO₂ and methane emissions in mine operations; and delaying leasing until technology to allow boilers to handle high-sodium coal is more widely available.

5. The Lease

41. Eight leases between Montana and Ark Land, for a total of 572 million tons of recoverable coal, were executed on April 20, 2010.

42. Ark Land paid Montana a bonus bid of \$85,845,110 (\$0.15/ton) to acquire rights to the State's Otter Creek coal reserves. In addition, Ark Land will pay the State a 12.5 percent royalty on every ton of coal mined.

43. The leases grant to Ark Land the Otter Creek tracts “for the purpose of mining and disposing of coal and constructing all such works, buildings, plants, structures and appliances as may be necessary and convenient to produce, save, care for, dispose of and remove said coal, and for the reclamation thereafter” for a term of ten years. Lease, ¶ 1.

44. The Otter Creek leases are made subject to Ark Land’s “compliance with the Montana Strip Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act (Title 82, Chapter 4, Parts 1 and 2, MCA).” Id. Further, Ark Land’s mining rights are subject to the Land Board’s “review and approval of [Ark Land’s] mine operation and reclamation plan” and compliance with MEPA. Id. None of these conditions reserves to the Land Board the ability to deny Ark Land the ability to exercise the mining rights granted by the lease altogether, nor do the leases provide the ability for the Land Board to alter or add lease conditions, or to modify the size or boundaries of the leased parcels.

II. THE ENVIRONMENTAL IMPACTS OF THE OTTER CREEK COAL MINE

45. Strip mining Otter Creek coal has the potential to significantly degrade the environment and human welfare.

A. Global Warming

46. Global warming is the result of a buildup of greenhouse gases—primarily CO₂—in the atmosphere, which reduces the reflection of solar radiation back out into space.

47. Many of the impacts of global warming are already being felt in Montana. As of 1997, annual precipitation had decreased by up to 20 percent in many parts of the State, and over the last decade, precipitation has declined much further, triggering drought conditions. See U.S. EPA, Climate Change and Montana, EPA 230-F-97-008z (1997). Climate models for the northern Rocky Mountains project an average annual temperature increase of between 3.6 and

7.2 °F by the end of this century, based on a range of CO₂ emissions scenarios. Steven M. Running, *Impacts of Climate Change on Forests of the Northern Rocky Mountains*, at 3 (Sept. 29, 2009), available at <http://bipartisanpolicy.org/sites/default/files/RockyClimate-pages-Proof150.pdf> (last visited May 12, 2010). If greenhouse gas emissions continue to grow, the region will likely experience warming at the high end of this range. See id.

48. Along with higher temperatures, the northern Rockies will see less water stored in snowpack, earlier spring snowmelt, and lower stream flows in the summer. Id. at 1. As a result, Montana will have longer summer droughts, less water availability, more insect infestations, and more intense wildfires. Id. Further, based on current warming trends, scientists estimate that glaciers could entirely disappear from Glacier National Park by 2020. Anne Minard, *No More Glaciers in Glacier National Park by 2020?*, National Geographic News (Mar. 2, 2009), available at <http://news.nationalgeographic.com/news/2009/03/090302-glaciers-melting.html> (last visited May 12, 2010).

49. Nationwide, approximately 36.5 percent of global warming-causing CO₂ emissions stem from the burning of fossil fuels—primarily coal—for the purpose of electricity generation. See U.S. Energy Info. Admin., *Emissions of Greenhouse Gases in the U.S. 2008, Overview*, DOE/EIA-0573 (Dec. 3, 2009)), at <http://www.eia.doe.gov/oiaf/1605/ggrpt/index.html> (last visited May 12, 2010).

50. The Land Board's decision to lease 572 million tons of coal at Otter Creek will allow Ark Land Company to strip mine 1.3 billion tons of coal. In 2008, Montana mines produced a total of 44.8 million tons of coal. See <http://www.eia.doe.gov/cneaf/coal/page/acr/tables2.pdf> (last visited May 12, 2010). At its peak, the Otter Creek mine could almost double Montana's coal production—independently producing 33.2 million tons of coal annually.

See 2009 Norwest Appraisal, App. C.

51. Nearly all of this coal is destined for combustion at coal-fired power plants, which will result in significant emissions of greenhouse gases, including approximately 2.4 billion tons of CO₂. In a study commissioned by DNRC, Norwest Corporation projected that the Otter Creek coal deposit—including privately and State-owned coal—would produce for sale to power plants 33.2 million tons of coal each year by year six of mine operations. 2009 Norwest Appraisal, App. C. At this production rate, combustion of Otter Creek coal would result in approximately 60.4 million tons of CO₂ emissions annually, or 1 % of annual U.S. CO₂ emissions based on 2008 emission levels.¹

B. Other Environmental Impacts

52. In addition to global warming, the Otter Creek coal lease will result in direct adverse effects on land, surface waters, groundwater, and air quality.

53. Strip mining requires the use of explosives to break through the surface and expose the coal seam. Strip mining eliminates vegetation, displaces wildlife, destroys wildlife habitat, and alters—sometimes permanently—the general topography and hydrology of the mined area.

54. When underground coal seams are exposed, they react with air and water to form

¹ In 2008, U.S. CO₂ emissions totaled 5,839 million tons. See Energy Info. Admin., DOE, Dep't of Energy and EPA, Emissions of Greenhouse Gases in the U.S. 2008, Overview, DOE/EIA-0573 (Dec. 3, 2009)), at <http://www.eia.doe.gov/oiaf/1605/ggrpt/index.html> (last visited May 11, 2010). Montana sub-bituminous coal has an average carbon dioxide emissions factor of 213.4 pounds of carbon dioxide per million BTUs. See Energy Info. Admin., DOE, Carbon Dioxide Emission Factors for Coal, DOE/EIA-0121, Table FE4 (Aug. 1994), at http://www.eia.doe.gov/cneaf/coal/quarterly/co2_article/co2.html (last visited May 11, 2010). Otter Creek coal heating values average 8,500 to 8,600 BTU/lb on an as-received basis. 2009 Norwest Valuation at E-3. Taking the median of 8,550 BTU/lb, one ton of Otter Creek coal will emit 1.82 tons CO₂ when combusted (3649.1 lbs CO₂/2000 lbs coal = 1.82). Therefore, combustion of 33.2 million tons of coal would result in approximately 60.4 million tons of CO₂.

sulfuric acid. As water drains from the mine, the acid mine drainage leaches into ground water and discharges into surface waters. Ground water contaminated by acid mine drainage injures crops if used for irrigation. Contaminated surface waters can destroy aquatic ecosystems, killing sensitive plants, fish, and other wildlife. Other pollution runoff and siltation from the mine site may reach surface waters—including the Tongue River and Yellowstone River—impairing their suitability for agriculture and ability to support aquatic life.

55. Strip mining at Otter Creek may also impact the hydrologic function of the aquifer, which is vital to region's agricultural productivity. While reclamation may eventually restore the surface and appearance of mined areas, aquifers are often permanently damaged.

56. Coal mining at Otter Creek will degrade air quality from the use of heavy equipment, from the drilling, blasting, and transportation of the coal, and fugitive dust from the mining site. In addition, Otter Creek coal may be burned for on-site power production, creating local air quality impacts.

57. Major coal mines often create a "boom and bust" cycle that can result in significant socio-economic impacts in the communities surrounding the mine.

58. To be economically viable, mining the Otter Creek coal tracts will require development of rail transport. The U.S. Surface Transportation Board has already approved construction of the Tongue River Railroad from Decker to Miles City, Montana. Construction and operation of the railroad will have significant environmental impacts and will adversely affect landowners, including MEIC and Sierra Club members, through whose property the railroad will run.

59. The Land Board deferred consideration of all of these impacts. In so doing, the Land Board relegated Montanans' right to a clean and healthful environment to an

afterthought—foreclosing the opportunity to avoid or reduce environmental degradation through lease conditions and eliminating the State’s ability to decide, after environmental impacts are examined and disclosed, that the Otter Creek tracts should not be leased at all.

LEGAL BACKGROUND

I. THE PUBLIC TRUST AND CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

60. The Land Board’s actions are governed by a constitutional and statutory public trust duty and the common law public trust doctrine. To comply with its public trust mandate, the Land Board is required to manage State resources, including the Otter Creek coal tracts, in a manner that is not detrimental to public welfare or the environment.

61. Under the common law public trust doctrine, it is firmly established that state lands acquired from the federal government are held in trust for the people of the state. The public trust doctrine not only authorizes states to enact legislation pertaining to state trust lands; it also serves as a limitation on the state’s activities on those lands. Specifically, the state may not dispose of an interest in trust lands except when it is in the best interests of the public welfare. See Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 455-56 (1892) (submerged lands are “held by the whole people for purposes in which the whole people are interested”); Ravalli County Fish & Game Ass’n, 273 Mont. at 379, 903 P.2d at 1368 (duty to manage trust lands in the best interests of the state “necessarily includes considering consequences to wildlife and the environment”).

62. The Land Board is further subject to a constitutional and statutory trust mandate to manage trust lands in a manner that will “best meet[] the needs of the people and the beneficiaries of the trust.” Mont. Code Ann. § 77-1-203(1)(a); see also id. § 77-3-301 (lease of State lands for coal mining must be in the “best interests of the state”); Mont. Const., Art. X, sec.

11 (“All lands of the state that have been or may be granted by congress ... shall be held in trust for the people.”).

63. In carrying out this duty, the Board is bound by “the guiding principle” that:

these lands ... are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

Mont. Code Ann. § 77-1-202. This duty embodies more than economic factors. See Friends of the Wild Swan v. Dep’t of Natural Res. and Conservation, 2005 MT 351, ¶ 21, 330 Mont. 186, ¶ 21, 127 P.3d 394, ¶ 21 (“Although the statutory directive to ‘secure the largest measure of legitimate and reasonable advantage’ certainly includes economics, the phrase is not limited in purpose to financial return.”). “[T]he duty to manage ... surface leased land to protect the best interests of the state ... necessarily includes considering consequences to wildlife and the environment.” Ravalli County Fish and Game Ass’n v. Mont. Dep’t of State Lands, 273 Mont. 371, 379, 903 P.2d 1362, 1368 (Mont. 1995).

64. In Montana, the Land Board’s public trust duties are animated by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Article II, Section 3 guarantees Montanans “the right to a clean and healthful environment.” Mont. Const., Art. II, sec. 3. Article IX, Section 1 provides that “[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Id., Art. IX, sec. 1. These constitutional provisions are intended to not “merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment.” Mont. Env’l Info. Ctr., ¶77. Read together, they provide environmental “protections which are both anticipatory and preventative.” Id.

///

II. MEPA

65. The Montana legislature identified the Montana Environmental Policy Act (“MEPA”) as the vehicle for implementing the State’s constitutional obligation to prevent unreasonable environmental degradation. See Mont. Code Ann. § 75-1-102. Modeled after the National Environmental Policy Act, MEPA requires “the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment.” Id. § 75-1-201(1)(b)(i)(A) (emphasis added). MEPA directs that “it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may ... fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” Id. § 75-1-103(2).

66. “MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands.” Ravalli County Fish and Game Ass’n v. Dep’t of State Lands, 273 Mont. 371, 384, 903 P.2d 1362, 1371 (1995). Thus, state decisionmakers are prohibited from “reach[ing] a decision without first engaging in the requisite significant impacts analysis.” Id.

67. MEPA also requires that decisions “lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing decline in the quality of the world environment.” Mont. Code Ann. § 75-1-201(1)(B)(vi).

68. Notwithstanding MEPA’s vital role in ensuring that State decisions do not unreasonably degrade the environment, the 2003 Montana Legislature adopted a blanket exception to MEPA’s review requirements for leases of State-owned resources for activities that

are subject to further permitting, without regard to the environmental consequences of any particular lease. Mont. Code Ann. § 77-1-121(2) (“The department and board are exempt from the provisions of [MEPA] when issuing any lease or license that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82.”). The exemption is not within MEPA itself, but rather the title of the Montana Code pertaining to the administration of state lands.

69. Under the authority of this exemption, the Land Board leased the Otter Creek coal tracts without first considering whether the lease may have significant environmental effects.

FIRST CAUSE OF ACTION
(Unconstitutionality of MEPA Exemption)

70. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 69.

71. In leasing the Otter Creek tracts, the Land Board applied a MEPA exemption, Mont. Code § 77-1-121(2), that violates the public’s constitutional right to a clean and healthful environment. See Mont. Const., Art. II, sec. 3, Art. IX, sec. 1

72. Section 77-1-121(2) of the Montana Code purports to exempt from MEPA review “any lease or license that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82.” Mont. Code Ann. § 77-1-121(2).

73. The State’s constitutional obligation to prevent unreasonable environmental degradation under Article II, section 3 and Article IX, section 1 of Montana’s Constitution is expressly implemented by MEPA. Mont. Code Ann. § 75-1-102.

74. Because it allowed the Land Board to lease the Otter Creek coal tracts without first conducting any review of the environmental consequences of its action, the blanket exception to MEPA in section 77-1-121(2) implicates Montanans’ “constitutional right to a clean and healthy environment and to be free from unreasonable degradation.” Mont. Env’l Info. Ctr.

¶ 79.

75. This impingement of a fundamental constitutional right is subject to strict judicial scrutiny. Id. ¶ 64. To survive judicial review, the Land Board's action "must be closely tailored to effectuate [a] compelling state interest." Id. ¶ 61 (quotation and citation omitted).

76. Because the record before the Legislature did not demonstrate any compelling state interest for the blanket MEPA exception, it is unconstitutional as applied to the Land Board's decision to lease the Otter Creek coal tracts. See id. ¶ 80 (Where nondegradation policy for high quality waters "is a reasonable legislative implementation of the mandate" to prevent unreasonable environmental degradation, a statutory provision that "arbitrarily excludes certain 'activities' from nondegradation review without regard to the nature or volume of the substances being discharged ... violates those environmental rights guaranteed by ... the Montana Constitution."). Id. ¶ 80.

77. Because it would allow the Land Board to side-step its constitutional mandate, section 77-1-121(1) is unconstitutional as applied to the Land Board's decision to lease the Otter Creek coal tracts.

SECOND CAUSE OF ACTION (Montana Environmental Policy Act)

78. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 77.

79. The Land Board's decision to lease Otter Creek without first determining whether it must prepare an environmental impact statement and considering alternatives to the proposed action violated MEPA, Mont. Code Ann. § 75-1-101, et seq.

80. The Land Board's leasing decision is subject to MEPA because it "may have an impact on the human environment." Id. § 75-1-201(1)(b)(i)(A).

81. Ark Land paid nearly \$86 million to acquire rights to State-owned Otter Creek

coal. Provided Ark Land complies with Montana law, neither the Department of Environmental Quality nor the Land Board may lawfully deny Ark Land the ability to mine Otter Creek.

82. The Otter Creek coal lease grants Ark Land the right to strip mine all or some of the 572.3 million tons of State-owned coal. The State lease will further enable mining of adjacent, privately owned coal that has also been leased by Arch Coal, for a combined total of 1.3 billion tons of coal. This massive strip mine will result in significant hydrological, water quality, and air quality impacts. In addition, combustion of the coal produced from the mine will spur global warming by releasing 2.4 billion tons of CO₂ into the atmosphere.

83. Prior to leasing the Otter Creek coal tracts, the Land Board was required to consider whether these and other environmental impacts required the preparation of an environmental impact statement and to analyze alternatives to the proposed lease. See id. Mont. Code Ann. § 75-1-201(1)(b)(iv). Because the Land Board failed to do so, issuing the Otter Creek coal lease violated MEPA.

THIRD CAUSE OF ACTION (Public Trust)

84. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 83.

85. The Land Board breached its public trust obligations by facilitating a massive new strip mine without first meaningfully considering the global warming, environmental, and economic impacts of mining and coal combustion. See Mont. Const., Art. X, sec. 11; Mont. Code Ann. §§ 77-1-202, 77-1-203(1)(a), 77-3-301; Illinois Cent. R. Co., 146 U.S. at 455-56.

86. The Land Board is bound by the public trust to permit only those activities on state land that are in the best interests of the state. See Mont. Code Ann. §§ 77-1-202, 77-1-203(1)(a), 77-3-301; Mont. Const., Art. X, sec. 11 (“All lands of the state that have been or may be granted by congress ... shall be held in trust for the people.”).

87. As directed by the Montana Supreme Court and Montana's Constitution, the Land Board's determination that leasing the Otter Creek Tracts for coal mining is in the best interests of Montanans should have taken into account the substantial threats posed by global warming and environmental degradation. See Ravalli County Fish and Game Ass'n, 273 Mont. at 384, 903 P.2d at 1371; Mont. Const., Art. II, sec. 3 and Art. IX, sec. 1.

88. Because the Land Board failed to consider whether the significant environmental degradation caused by strip mining 1.3 billion tons of coal in the Tongue River watershed satisfied the "best interests" requirement of the Land Board's public trust obligation, the Otter Creek coal lease is unlawful.

REQUEST FOR RELIEF

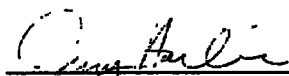
THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Montana Code section 77-1-121(2) violates Article II, section 3 and Article IX, section 1 of Montana's Constitution;
2. Declare that the Otter Creek coal leases, executed between the Land Board and Ark Land on April 20, 2010, violate MEPA;
3. Declare that the Land Board violated its public trust obligation by failing to consider whether the Otter Creek coal leases are in the best interest of Montanans in light of potential adverse environmental impacts;
4. Set aside and remand the Otter Creek coal leases to the Land Board with direction to comply with MEPA and the Land Board's public trust obligations;
5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and

///

6. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted on this 13th day of May, 2010,

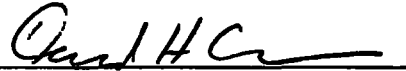


Douglas L. Honnold
Jenny K. Harbine
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
dhonnold@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2010, I have caused a copy of the foregoing Reply of Tongue River Railroad Company, Inc. to be served by first-class mail, postage prepaid, on all parties of record in STB Finance Docket Nos. 30186 (Sub-No. 3), 30186 (Sub No.2) and 30186.



David H. Coburn